No. 11,308

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NYE & NISSEN (a cororation), and
ABRAHAM MONCHARSH,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' PETITION FOR A REHEARING.

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1. That the conviction of Appellant Moncharsh on the substantive counts, without evidence of his participation therein, or his aiding and abetting thereof, can be sustained by the application of the theory of the *Pinkerton* case even though the trial Judge did not submit the case to the jury on that theory, which requires findings by the jury of vital issues of fact before it may be invoked.

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2. That the admission of evidence of other offenses similar to the substantive offenses and permitting the jury to consider them as evidence tending to show intent to commit the substantive offenses was not error as to Appellant Moncharsh, who had no connection directly or indirectly with the substantive offenses, because the *Pinkerton* case applies to hold him responsible for their commission.

3. That the conspiracy as proven was a single continuing one.

4. That the conspiracy count was not duplicitous.

5. That the introduction in evidence of letters relating to eggs aboard the S.S. Bates was proper because they tended to show knowledge on the part of Moncharsh of fraudulent practices engaged in by Company employees.

6. That part of the Pineda testimony being admissible, a motion to strike it all was properly denied.

ARGUMENT.

POINT ONE.

The learned trial Judge submitted the issue of guilt or innocence on the substantive counts to the jury with instructions requiring them to find evidence of either direct participation or aiding and abetting, before a conviction on these counts could be returned. However, there was no evidence from which the jury could draw an inference that Moncharsh participated in, directed, knew of, aided, abetted, commanded, induced or procured the filing of any false vouchers which were the basis of the substantive

counts in this case. Nevertheless, his conviction for these crimes is now sustained on the sole ground that the case of *Pinkerton v. United States,* 328 U.S. 640 (1946), compels the ruling. Thus, the theory upon which this Court affirms the verdict of guilt on these counts is different from that advanced by the prosecution in the trial Court and, as we have observed, wholly different from that upon which the Court submitted the case to the jury. This theory was introduced for the first time by the prosecution on appeal. By resting the conviction of Moncharsh on these counts wholly on the *Pinkerton* doctrine, this Court very evidently agrees that the evidence is deficient with respect to direct participation or aiding and abetting. Appellant, prosecution and Court alike, are apparently in accord on that issue.

Yet, there is a basic distinction between the *Pinkerton* case and this one. It lies in this: that in the *Pinkerton* case the trial Court submitted the issue of innocence or guilt of the defendants on the substantive counts to the jury with the specific instruction that certain findings of fact would have to be made before the determination was arrived at. The Supreme Court, in affirming the convictions in the *Pinkerton* case, pointedly noted that charge (328 U.S. 640, 645-646, footnote 6):

> "6. The trial court charged: '* * * after you gentlemen have considered all the evidence in this case, if you are satisfied from the evidence beyond a reasonable doubt that at the time these particular substantive offenses were committed, that is, the offenses charged in the first ten counts of this indictment if you are satisfied from the evidence beyond a reasonable doubt that the two defendants were in an

> unlawful conspiracy, as I have heretofore defined unlawful conspiracy to you, then you would have a right, if you found that to be true to your satisfaction beyond a reasonable doubt, to convict each of these defendants on all these substantive counts, provided the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy or object of the unlawful conspiracy, which you have found from the evidence existed.' Daniel was not indicted as an aider or abettor (see Criminal Code, § 332, 18 U.S.C. 550), nor was his case submitted to the jury on that theory."

We observe, therefore, that in the *Pinkerton* case "the question was submitted to the jury on the theory that such petitioner could be found guilty of the substantive offenses, *if it was found* at the time these offenses were committed petitioners were parties to an unlawful conspiracy and the substantive offenses charged were in fact committed in furtherance of it." (328 U.S. 640, 645; italics ours.)

The *Pinkerton* case does not create a legal conclusion, as this Court may believe, that substantive offenses committed by a member of a conspiracy are the acts of all members of that conspiracy. Before the vicarious liability for the acts of another can be imposed upon a so-called co-conspirator, the *Pinkerton* case very evidently holds that the *jury* must find that (1) the conspiracy was in existence at the time the substantive offenses were committed; and (2) the substantive offenses were acts in furtherance of the conspiracy or the object of the conspiracy. Thus, the Supreme Court was careful to point out that:

> "A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." (328 U.S. 640, 647.)

This statement serves to correct the erroneous concept that each member of a conspiracy is liable as an aider and abettor for the acts of all of its members. The Supreme Court recognizes the necessity for specific fact finding by the jury before the liability of one person can be transferred to another. Further, in *Johnson v. United States*, 62 F. 2d 32, cited by the Court in further support of its ruling, the issue of the existence of the conspiracy at the time that the substantive offenses were committed was submitted to the jury and found in the affirmative. That is a basic distinction between that case and this one, apart from others suggested by a comparison of the facts of both cases.

The duty of finding these facts is wholly within the province of the jury, with proper instruction of the law as it exists from the trial Court. Concededly, it is not the function of either the trial Court or the Appellate Court.

In this case, the jury was not requested to make the findings of fact which are the necessary grounds upon which the *Pinkerton* doctrine must be rested. What was lacking below, however, has been quite apparently supplied here in order to bring the issue within the *Pinkerton* rule. Thus, this Court has substituted its own findings,

based on the record submitted on appeal, for that of the jury below, namely, that the conspiracy of which Appellant Moncharsh was a member, was in effect at the time the substantive acts were committed and that these acts were in furtherance of that conspiracy.

We respectfully suggest, however, that the issue is not whether guilt can be so spelt out of this record by this Court, but rather is whether it was found by the jury below on proper instruction from the Court. In *Bollenbach v. United States*, 326 U.S. 607, 614, the Supreme Court in criticizing such practice stated:

> "* * * In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

And the Court further stated the proposition in the following language:

> "* * * In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

The question is not, as we might believe from the Court's opinion, "that unless there is substantial evidence to support the verdict under the instructions which were given,

the verdict cannot be sustained on the ground that the evidence was sufficient under a theory as to which the jury was uninstructed."

Rather, the question is whether the verdict of guilt as to Appellant Moncharsh on the substantive counts on which there was no evidence of participation of aiding or abetting can be affirmed on a theory of law upon which the issue was not submitted to the jury and which theory of law requires specific findings of fact before it can be invoked. We believe that a consideration of this question compels a finding in the negative. The error created by the affirmance of the conviction of Moncharsh on the substantive counts on the doctrine of the *Pinkerton* case is not merely a technical one. To so hold is to deprive him of his constitutional right to a trial by jury in accordance with the law of the land. *Bollenbach v. United States*, 326 U.S. 607 (1946); *Kraus & Bros. v. United States*, 327 U.S. 614 (1946); *Bihn v. United States*, 328 U.S. 633 (1946); *Kotteakos v. United States*, 328 U.S. 750 (1946).

POINT TWO.

The basis of this Court's ruling that there was no error in permitting the jury to consider other offenses similar to the substantive offenses for the purpose of determining the intent with which Moncharsh committed those substantive crimes is also wholly rested upon the *Pinkerton* case. Thus, we find in the Court's opinion the following language:

> "* * * This contention ignores the evidence indicating that Moncharsh participated in a conspiracy, in fur-

therance of which the acts charged in the substantive counts and the prior offenses were committed. This evidence establishes Moncharsh as an instigator of such acts and offenses, which thereby became admissible against him in determining his guilt under the substantive counts. *Pinkerton v. United States,* 328 U.S. 640."

We feel that the non-application of the doctrine of the *Pinkerton* case to this one on the substantive counts has been cogently demonstrated in our foregoing argument under Point One. It is apparent that the original error thus created has produced the error in this holding, namely that Appellant Moncharsh, as a co-conspirator, is responsible for the offenses of filing false claims in 1944 as an aider or abettor because the record justifies that conclusion on the part of this Court.

Since this point has been fully treated in our main brief, we feel it unnecessary to again point out the lack of any connection between Appellant Moncharsh and most of the so-called other offenses or to reiterate the correct rule of law on the point.

POINT THREE.

The conspiracy was not a continuing one. We wish to avoid the repetition of the lengthy and controverted facts of this case. We note that this Court in its opinion has observed that the evidence with reference to Appellant Moncharsh, related chiefly to the period prior to 1943. Moreover, this Court recognizes the fact that if a variance existed between the charged conspiracy and the proof,

it would most likely be a material one. It is difficult to understand, however, how isolated instances of alleged impeding of the inspection service of the Army and Navy for the years 1939 to 1942 had any connection with the shipment of eggs to certain Merchant vessels operated on behalf of War Shipping Administration in the year 1944. It would seem in order to justify the conclusion that "all misconduct of defendants was germane to one consistent and persistent course of wrongdoing", there must be some relation in time, place, persons and circumstances to the alleged course of wrongdoing. As we have pointed out in brief and argument, that relationship is lacking here.

The danger inherent in an indictment of this nature, which endeavors to charge a single conspiracy persisting throughout a period of some eight years on the part of persons who were engaged in a *per se* legitimate business is that every effort may be made to broaden the interpretation of the evidence rather than to narrow it. Yet, we feel, that the conclusion which we urged upon this Court, that there was in fact two conspiracies proved, whereas one was alleged does not require an artificial or narrow view of the evidence. Careful analysis reveals that all evidence from which an inference of impairing the inspection system of the Government could be drawn, which was the gist of the conspiracy, did not go beyond the year 1942; that all evidence tending to connect Appellant Moncharsh with these activities did not go beyond 1942; that in the year 1943, one solitary complaint concerning 40 cases of eggs, which complaint was amicably adjusted between vendor and vendee, is the only evidence from which any inference of fraudulent activity could be

drawn and certainly none as to Appellant Moncharsh; that in 1944 all evidence related specifically to War Shipping Administration ships, involving deficient deliveries, with no impeding of the inspection system and no evidence connecting Appellant Moncharsh with them.

The time during which the fraud was allegedly committed upon War Shipping Administration was 1944; the time the alleged fraud upon the Army and Navy was 1939 to 1942. The type of alleged fraud upon War Shipping Administration was delivery of inferior products without reference to impeding or impairing the inspection system; the type of alleged fraud upon Army and Navy was impeding and impairing their inspection services only. The persons involved with respect to War Shipping Administration were Berman and Goddard; with respect to Army and Navy, Moncharsh, Menges, Berman and Goddard. At the time that the frauds were supposedly committed upon War Shipping Administration there were none committed upon Army and Navy; when supposedly committed upon Army and Navy there were none upon War Shipping Administration. These facts tend to show the variance in the proof, namely, that two conspiracies were shown.

POINT FOUR.

The conspiracy count, we submit, was duplicitous in that it alleged two separate conspiracies. The War Shipping Administration, as we have previously noted, did not come into existence until some five years after the unlawful agreement was alleged to have been formed.

The case of *Rose v. United States,* 149 F.2d 755, is suggested by the Court as a case that contains a similar situation. However, in that case, a conspiracy was alleged to have begun about December 12, 1941, and the Second War Powers Act came into existence some three and one-half months later. The conspiracy was to commit offenses against the United States, viz., offenses condemned by specific regulations which were immediately superseded or incorporated in the Second War Powers Act. In the instant case, however, the unlawful agreement could have no such direct relationship to the War Shipping Administration in point of time. Nor was the character of the unlawful agreement similar to that described in the *Rose* case.

We submit, that a reading of Count I of the indictment leads to a reasonable conclusion that the Count does not charge one conspiracy with several objects, but rather two separate and distinct conspiracies.

POINT FIVE.

As an additional point requiring reconsideration of this Court's judgment, we respectfully contend that there is error in holding that the letters relating to eggs aboard the S.S. Bates were duly admitted in evidence. This Court has held in its opinion that these letters tended to show knowledge on the part of Moncharsh of fraudulent practices carried out by his employees.

This Court sums up the matter as follows:

> "* * * The letters tended to prove that Moncharsh knew of the practices engaged in by Nye & Nissen's

> employees, and therefore were relevant to the question of fraudulent intent. *Rice v. United States* (CCA 10), 149 F.2d 601, 603, and cases cited. It follows that they were properly admitted to contradict the statements made by Moncharsh as a witness."

Thus it appears clearly from the language of the Court that the admission of these letters has been upheld by it on the theory that they tended to show knowledge of fraudulent practices "engaged in by Nye & Nissen employees". We respectfully and firmly contend that the letters prove no such thing. At the most, they show that after these eggs had been in the hands of the consignee for a period of time varying from three weeks to two and one-half months, some of them were found in inedible condition aboard the S.S. Bates—some 30 cases. The letters show that a claim for refund was made and a partial refund voluntarily made by the Company at the direction of Moncharsh. We are utterly at a loss to understand how such letters and the conduct of Moncharsh in reference thereto could be either direct proof of or facts from which fraud could be implied. That their admission was mischievous and prejudicial to Appellants we believe to be obvious. For evidently the jury took the same view of the evidence as that expressed by the Court in its opinion. With great respect, we urge a reconsideration of this point, especially because of the emphasis placed upon this evidence by the prosecution in presenting its cause to the jury. The further vice in the introduction of such evidence is the opening up of multiple avenues of inquiry—almost an endless procedure with the conduct of the defendant corporation and the other defendants

being examined over a period of some eight years. If this evidence was relevant at all, it belonged in the prosecution's case in chief and being interposed in the closing moments of the case provided further emphasis and provided additional prejudice.

The authority of *Rice v. United States,* 149 F.2d 602, does hold that a letter to the accused or brought to his attention, calling attention to misrepresentations or wrongful practices employed by salesmen or others connected with the organization or enterprises is admissible in evidence for the purpose of bringing home to him knowledge of such misrepresentations or practices.

We do not contend that the law is otherwise than stated in this authority. But the aforementioned case is not an authority for the admission of letters that do not show or tend to show fraud. To draw inferences of fraudulent conduct from such facts is to grossly prejudice the rights of a defendant.

POINT SIX.

An additional point requiring reconsideration of this Court's judgment is in respect to that phase of its opinion relating to the Pineda testimony. The Court held:

> "We have, nevertheless, examined Pineda's testimony and are of the opinion that much of it was obviously competent, relevant and material. Part of it being admissible, a motion to strike it all was properly denied."

Every part of the Pineda testimony, the substance of which is given in the brief commencing at page 26 and

ending at page 35, together with all of the testimony relating to the butter-cutting incident, is clearly inadmissible. It is the fact and is clearly implicit in the Court's decision that a considerable quantity of the 622 pages of Pineda's testimony is inadmissible.

The basis of the Court's decision is not borne out by the record. The Court below did not rule on a motion to strike *all* testimony of Pineda but, on the contrary, ruled on a motion to strike specific parts of the testimony of Pineda, including each of the matters analyzed in the brief. Defendants moved to strike 24 separate phases of the Pineda testimony and the motion is precise that it relates to each separate portion:

> "Said motion is made as to the evidence covered in each paragraph and subdivision above and each fact covered in each of the above numbered paragraphs on all and each of the following grounds as though said grounds had been specifically repeated as to each paragraph and each fact, transaction or episode covered in each paragraph:"

It is respectfully urged that upon reconsideration of this case all of the testimony analyzed in the brief for appellants is clearly inadmissible and having been admitted over the objection of the defendant, calls for the reversal of the case. We repeat: "It is not an overstatement to declare that the Pineda testimony is the most wretched and legally incompetent proof to be found in any record of any case in this Circuit. The Court below could not follow or comprehend its relevancy yet permitted it to stand for what it was worth." A conviction based upon venom breathed into a record by incompetent and inma-

terial evidence should not be permitted to stand where it plays a most important part in the conviction.

Because of the importance of this phase of the case to the appellants we are including in the appendix to this petition for rehearing a more complete statement showing that appellant is entitled to a full and complete review on the subject of the admissibility of the Pineda testimony.

CONCLUSION.

We feel that this Honorable Court has erred in the foregoing respects. Accordingly, we respectfully request that this petition for rehearing be granted so that the Court may avail itself of the right to correct them and in order that no injustice may result from the decision heretofore entered.

Dated, San Francisco, California,
July 19, 1948.

Respectfully submitted,
JOSEPH B. KEENAN,
HAROLD C. FAULKNER,
A. J. ZIRPOLI,
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RAYMOND L. SULLIVAN,
Attorneys for Appellants and Petitioners.

Certificate of Counsel.

We, Joseph B. Keenan and Harold C. Faulkner, do hereby certify that the foregoing petition, to our best judgment and belief, is well founded and is not interposed for the purpose of delay.

Dated, San Francisco, California,
July 19, 1948.

Joseph B. Keenan,
Harold C. Faulkner.

(Appendix Follows.)

Appendix.

Appendix

It was with regret that counsel for appellants read that portion of the opinion of the Court indicating that counsel had failed to present properly an important point to the Court on appeal. We feel very keenly that the criticism of the Court is not founded on the record. Local counsel for the appellants was under the impression, perhaps mistaken, after discussions with members of the Court in connection with the length of the brief which was permitted to be filed, that it was presented in a manner satisfactory to the Court. First, the quantity of evidence of Pineda pointed out by the Court to be 622 pages did not lend itself to setting out the substance of all in the brief. However, the substance which is set out in the brief, pages 26 to 36 alone, is sufficient to call for a reversal of the case. Therein the testimony is analyzed and a reference to the transcript is given. Counsel for appellant considered that when in the brief reference was made to page 9 of the appendix and page 18 of the appendix wherein is set out the full motion to exclude, which the lower Court denied, and the full motion to strike, which referred to the motion to exclude which also was denied, a full and complete specification of error in a full and accurate form had been presented for the use of the Court.

In the motion to exclude, as the Court points out, 24 separate phases of the Pineda testimony are sought to be excluded. The motion was made to exclude each part thereof. The motion on page 13 of the appendix to the brief of appellant contains the following:

Each instance testified to by Pineda of deliveries of eggs to the waterfront outlined in our opening brief was clearly inadmissible. Constant repetition of instances of changing eggs from one case to another were all clearly inadmissible. It was routine work in any egg-packing plant. All transactions relating to eggs emanating from the Petaluma plant at which there wasn't the slightest claim of irregularity or attempt to defraud the inspection service are clearly inadmissible.

We could go on and on multiplying instance after instance where under no theory of the case was the testimony admissible.